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BETA TEGAP SDN BHD

v.

MAJLIS PERBANDARAN SEPANG; PEGUAM NEGARA MALAYSIA (INTERVENER)

B

HIGH COURT MALAYA, KUALA LUMPUR
ZALEHA YUSOF J
[JUDICIAL REVIEW NO: R2-25-259-12-2012]
21 FEBRUARY 2013

C

CIVIL PROCEDURE: *Judicial review - Application for - Application against decision for planning permission - Construction of AES pole and camera on highway roads - Requirement to obtain permission from city council - Proper party to seek permission from - Whether AES pole and*
D *camera located on Federal or State road - Whether roads fell under town council's jurisdiction - Whether AES pole and camera fell under definition of 'building' - Federal Roads Act 1959, s. 3 - Road Transport Act 1987, ss. 67 & 85 - Street, Drainage and Building Act 1974, ss. 70 & 72*

E

CIVIL PROCEDURE: *Intervention - Application for - Application by Attorney General of Malaysia to intervene in judicial review - Application against decision for planning permission for construction of AES pole and camera on highway roads - Locus standi to intervene - Whether matter of public interest - Rules of Court 2012, O. 15 r. 6 & O. 53 r. 8 -*
F *Federal Constitution, art. 145*

STATUTORY INTERPRETATION: *Definition - Application against decision for planning permission for construction of AES pole and camera on highway roads - Definition of 'building' - Whether AES pole and camera fell under definition of 'building' - Street, Drainage and Building*
G *Act 1974, s. 3*

This was an application for judicial review against the decision of the respondent requiring the applicant to apply for planning permission for the construction of a pole and camera ('the AES
H pole'). The AES pole was to be utilised for the operation of the automated enforcement system ('AES') provided by the applicant pursuant to an initiative of the Federal Government in implementing road safety measure of reducing road accidents and enforcing traffic laws. The applicant further sought to review the
I respondent's decision that the applicant had committed an offence under s. 70(3) of the Street, Drainage and Building Act 1974

('SDBA'), for the construction of the AES pole on the PLUS and SKVE Highway roads without the respondent's written approval and directing the applicant to take action pursuant to s. 72(1)(b) of the SDBA to demolish the AES Pole within 14 days from the date of the notice and pursuant to s. 72(1)(c) of the SDBA to cover the AES camera forthwith within 24 hours from the date of the notice. In addition to the abovementioned, the applicant also sought a declaration that the respondent did not have jurisdiction on the PLUS & SKVE Highways. The Attorney General of Malaysia ('AG') applied to intervene in the present application as it was contended that the matter for determination before the court was a matter of public interest and concerned publication policy. In opposing the AG's application, the respondent argued that the AG did not have the necessary *locus standi* to intervene and that the issue in dispute was a private matter and would not affect the interest of the public. It was further argued that the AG had failed to meet the test under O. 53 r. 8(1) of the Rules of the High Court 1980 ('RHC'), which specifically caters to person claiming an interest in the judicial review proceedings who wished to be heard in opposition. Both the applicant and the AG submitted that the respondent had no jurisdiction to issue notices as the PLUS and SKVE highways were Federal roads. However, the respondent averred that the AES posts and camera were erected on State land and therefore, fell under the jurisdiction of the respondent. The issues that arose for the court's adjudication were: (i) whether O. 53 r. 8(1) of the Rules of Court 2012, which was a specific provision under judicial review, was applicable to the AG; (ii) whether the AES pole and its camera was a building; and (iii) who was the proper authority from which permission was required before the AES structure could be erected on the said highway roads.

Held (allowing application):

(1) The AG's position is special. He is not just a person. He is supposed and expected to be a guardian of public interest; he is supposed to and expected to act when matters concern public interest or public policy. This is a common law principle which one follows by virtue of s. 3 of the Civil Law Act 1956. The AES camera concerned the enforcement of traffic laws and the court could take judicial notice of the public interest generated by the AES camera. The right to intervene by the AG was independent of the ROC whether it was O. 15 r. 16 or O. 53 r. 8. (paras 7 & 8)

(2) The words 'any wall, fence, platform, post' appearing in the SDBA must be read independently of the words 'house, hut, shed or roofed enclosure' and the phrase 'or any structure support or foundation connected to the foregoing' must not be confined to the first two lines of the definition. If in the Local Government Act 1976 ('LGA'), a 'post' is a building, it has to be the same in the SDBA. Local government could not have two different definition of the same word in carrying out its daily function. If s. 3 of the SDBA is applied, the AES pole with the attached camera was a building under the said section. (para 13)

(3) The executive authority pertaining to the Road Transport Act 1987 ('RTA') and Federal Roads Act 1959 ('FRA') are with the Federation. Hence, even though the land is still state land, but since the highway roads had already been declared as Federal roads under these Acts, the State Government would be under a constitutional obligation to ensure compliance and not to impede or prejudice the exercise of the executive authority of the Federation pursuant to these Acts. Furthermore, pursuant to s. 85 of the RTA, the approval to carry out any works of any description in, upon, over or under any federal road vests with the Minister of Works. The respondent clearly had no authority to give any approval as far as Federal roads were concerned. The spots where those AES structures were located are within Federal roads and does not fall within the jurisdiction of the respondent. (paras 13 & 17)

Case(s) referred to:

Adams v. Adams (Attorney-General Intervening) [1970] 3 All ER 572 ***(refd)***

Associated Provincial Picture Houses Ltd v. Wednesbury Corp [1948] 1 KB 223 ***(refd)***

Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC ***(refd)***

Council of Civil Service Unions & Others v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 CLJ 701 FC ***(refd)***

Ganad Media Sdn Bhd v. Metrawiac Corporation Sdn Bhd & Anor; Pentadbir Tanah Daerah Petaling (Third Party) [2010] 1 LNS 1254 HC ***(refd)***

ICRV Holdings Ltd v. Tri-Par Holdings Ltd [1996] 3 RPR (3d) 49 ***(refd)***

Majlis Agama Islam Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405 FC ***(refd)***

McKenzie v. Ferguson [1923] 4 DLR 931 ***(refd)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***
Tan Sri Joseph Kurup v. Danny Anthony Andipai; Attorney General, Malaysia (Intervener) [2009] 3 CLJ 523 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 3
Federal Constitution, arts. 74(1), 80(1), 81, 145
Federal Roads Act 1959, s. 3
Highway Authority Malaysia (Incorporation) Act 1980, s. 21(1)
Local Government Act 1976, s. 2
National Land Code, ss. 5, 40, 41, 42, 62
Road Transport Act 1987, ss. 67, 85
Rules of Court 2012, O. 15 r. 6, O. 53, r. 8
Rules of the High Court 1980, O. 15 r. 6, O. 53 r. 8(1)
Street, Drainage and Building Act 1974, ss. 3, 70(1), (13)(c), 72(1)(b), (c)

Property Law Act [RSBC 1996] Chapter 377 [CAN], s. 32

For the applicant - Alex Nandaseri De Silva (Gavin Jay Anand Jayapal with him); M/s Bodipalar Ponnudurai De Silva
For the respondent - Gobind Singh Deo (Mohd Haijan Omar & Joanne Chua Tsu Fae with him); M/s Thomas Philip
For the intervener - Amarjeet Singh Serjit Singh (Suzana Atan with him); SFCs

Reported by Najib Tamby

JUDGMENT

Zaleha Yusof J:

[1] This is an application for judicial review of the following decision of the respondent:

(i) the respondent's decision ("the respondent's first decision") requiring the applicant to apply for planning permission for the construction of a pole and camera ("the AES Pole") to be utilized for the operation of the Automated Enforcement System ("AES") provided by the applicant pursuant to an initiative of the Federal Government with the primary objective of changing the attitude of drivers as a road safety measure of reducing road accidents and enforcing traffic laws on speeding at KM301.7, North South Highway (PLUS) heading to Kuala Lumpur near the Malaysian Highway Authorities Headquarters

at Mukim Dengkil, Daerah Sepang, Negeri Selangor ("PLUS HIGHWAY"). The applicant was informed of this decision by letter dated 19 November 2012 ("the first notice").

(ii) the respondent's decision ("the respondent's second decision") requiring the applicant to apply for planning permission for the construction of a pole and camera ("the AES Pole") to be utilised for the operation of the Automated Enforcement System ("AES") at KM6.6, South Klang Valley Highway, heading to Kajang near the SHELL Petrol Station in Taman Suria Tropika, Mukim Dengkil, Daerah Sepang, Negeri Selangor ("SKVE Highway"). The applicant was informed of this decision by letter dated 19 November 2012 ("the second notice").

(iii) the respondent's decision ("the respondent's third decision") that the applicant has committed an offence under s. 70(13)(c) Street, Drainage and Building Act 1974 ("the SDBA"), for the construction of the AES Pole on the PLUS and SKVE Highways without the respondent's written approval and directing the applicant to take action pursuant to s. 72(1)(b) of the SDBA to demolish the AES Pole within 14 days from the date of the notice and pursuant to s. 72(1)(c) of the SDBA to cover the AES camera forthwith within 24 hours from the date of the notice. The applicant was informed of this decision by letter dated 6 December 2012 which was amended by letter dated 7 December 2012 ("the third notice").

[2] Besides, the applicant also seeks a declaration that the respondent does not have jurisdiction on the PLUS & SKVE Highway.

Intervener's Application

[3] The Attorney General of Malaysia, *vide* encl. 7 had applied to intervene in this judicial review application on the ground that the matter for determination before the court is a matter of public interest and concerns publication policy.

[4] The respondent opposed the application on the ground that the Attorney General does not have *locus standi* to intervene based on the Federal Court decision in the case of *Majlis Agama Islam*

Selangor v. Bong Boon Chuen & Ors [2009] 6 CLJ 405. In *Bong*'s case the Federal Court held, *inter alia*, that O. 53 r. 8(1) of the Rules of the High Court 1980 specifically caters to person claiming an interest in the judicial review proceedings and who wishes to be heard in opposition. It is argued that in the affidavit filed by the Attorney General there is no averment that he wishes to be heard in opposition. Hence, the Attorney General has failed to meet the test required under O. 53 r. 8(1). The Attorney General also has not shown that he has a direct interest in the matter. The Federal Constitution does not give him power to intervene as required by art. 145. The Attorney General has also not shown any other law that gives him power to intervene. Further it is also argued that the issue in dispute is a private matter and will not affect the interest of the public.

[5] On behalf of the Attorney General, it was argued that the application was not made under O. 15 r. 6 or O. 53 r. 8 of the Rules of the High Court 1980. Nor was it made by virtue of art. 145 of the Federal Constitution. The Attorney General is the guardian of public interest and the learned Senior Federal Counsel quotes the decision in *Adams v. Adams (Attorney-General intervening)* [1970] 3 All ER 572 and argues that the common law position is followed by virtue of s. 3 of the Civil Law Act 1956 ('Act 67').

[6] I have considered the arguments of the parties. I note that in *Bong*'s case (*supra*), the proposed intervener was *Majlis Agama Islam Selangor*. In the instance, the proposed intervener is the Attorney General of Malaysia. The issue before me is therefore whether O. 53 r. 8(1) which is a specific provision under judicial review, is applicable to him.

[7] Upon considering submissions of learned counsels for the respondent and the learned Senior Federal Counsel for the Attorney General, I agree with the learned counsel for the Attorney General that the Attorney General's position is special. He is not just a person. He is supposed to be a guardian of public interest; he is supposed and expected to act when matters concern public interest or public policy. This is a common law principle which one follows by virtue of s. 3 of the Act 67. The AES camera concerns the enforcement of traffic laws and I feel the court can take judicial notice of the public interest generated by the AES cameras.

[8] Hence, I am of the opinion that the right to intervene by the Attorney General is independent of the Rules of Court 2012 whether it is O. 15 r. 16 or O. 53 r. 8; as submitted by the learned Senior Federal Counsel.

[9] The applicant in the instant case claims that it had obtained the approval of a federal authority ie, Lembaga Lebuhraya Malaysia. Whereas the respondent claims that its approval must first be obtained. Hence to me, it is clear that this case would involve constitutional issue ie, federal against state's (local authority) power or jurisdiction.

[10] To me, it is not a mere private suit. Even if it is, I am of the view that the Attorney General has a right to intervene as, as stated earlier, the issue involves the federal government's rights and powers. In *Adam*'s case (*supra*) it was held *inter alia*:

> In my view the Attorney-General has the right of intervention in a private suit whenever it may affect the prerogatives of the Crown, ... and he certainly has in such circumstances *locus standi* at the invitation of the court or with the leave of the court.

[11] There have been many instances where the Attorney General had been allowed or invited by the court to intervene. Refer to *Tan Sri Joseph Kurup v. Danny Anthony Andipai; Attorney General, Malaysia (Intervener)* [2009] 3 CLJ 523; [2009] 3 MLJ 1 and *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 CLJ 701. I feel, the instant case is of no difference although it pertains to judicial review.

[12] I therefore allow encl. 7 with no order as to cost.

[13] Substantive Application

(i) AES System and Background Facts

(a) The AES System is a system where the details and recording of traffic offences is automated. It utilises two forms of tracking devices which include stationary and mobile cameras that take both pictures and videos.

(b) The Federal Government has introduced the AES towards the objective of reducing road accidents throughout the country.

(c) The implementing authority of the AES is the Road Transport Department ("RTD"). The RTD enforces the traffic laws by issuing summonses to offenders caught by the AES pursuant to the Road Transport Act 1987 ('Act 333')

(d) The applicant pursuant to a contract with the Federal Government had erected two such AES structures on the side-table at KM 301.7 of the North-South Highway ("PLUS") facing the direction of Kuala Lumpur and on the side-table at KM 6.6 of the South Klang Valley Expressway ("SKVE") facing the direction of Kajang ("the highways").

(e) The applicant erected the AES structures after obtaining the permission of Lembaga Lebuhraya Malaysia ("LLM") which is the Highway Authority of Malaysia pursuant to the Highway Authority Malaysia (Incorporation) Act 1980 (Act 231).

(f) The said AES structures are situated in the district of Sepang, Selangor. The local authority for Sepang is Majlis Perbandaran Sepang ("MPS").

(g) MPS made a decision that the erection of the AES structures requires the permission of the local authority under s. 70(1) of the Street, Drainage and Building Act 1974 ('Act 133').

(h) This decision is communicated to the applicant in the following notices dated 19 November 2012:

i. Notice requiring the applicant to supply for planning permission for the AES structure erected at KM 301.7 PLUS Highway.

ii. Notice of Offence for erecting a building ie, the AES structure at KM 301.7 PLUS Highway without permission under section 70(13)(c) of Act 133.

iii. Notice requiring the applicant to apply for planning permission of the AES structure erected at KM6.6 SKVE Highway.

iv. Notice of Offence for erecting a building ie, the AES structure at KM 6.6 SKVE Highway without permission under section 70(13)(c) of Act 133.

A (g) On 6 December 2012, MPS issued a notice directing the applicant to do the following acts:

i. demolish both the said AES structures within 14 days of receiving the said notice pursuant to section 72(1)(b) of Act 133; and

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ii. cover the both the cameras within 24 hours from receiving the notice pursuant to section 27(1)(c) of Act 133.

C (ii) Issue

Who is the proper authority from which permission is required before the AES structure can be erected on the said highways?

D (iii) Applicant's and Intervener's Submissions

(a) Section 3 of the Federal Roads Act 1959 ('Act 376') provides:

Power to declare roads, etc, to be federal

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3. The Minister may after consultation with the Government of the State concerned, by order declare any road, bridge, ferry or other means of communication in any Sate to be Federal.

F (b) Mr. Alex for the applicant and Mr. Amerjeet for the Attorney General both submit that the respondent has no jurisdiction to issue those notices as the PLUS and SKVE Highways have been declared by the Minister (in exercise of the powers conferred by s. 3 of the Act 376) to be G Federal roads. *Vide* P.U.(A) 9 dated 27 December 1988, the Minister had indeed declared, the PLUS Highways to be a Federal road with effect from 15 June 1982 and *vide* P.U.(A) 217 dated 25 June 2010 the SKVE highway was declared to be a Federal road with effect from 29 June H 2010.

(c) On behalf of the Attorney General, it is further argued that the Road Transport Act 1987 (Act 333) was enacted by Parliament using its power under item 1 of List 1 in the

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Ninth Schedule to the Federal Constitution, by virtue of art. 74 cl. (1) of the same. Hence, by virtue of art. 80 cl. (1), the Federation has executive authority overall matters provided in Act 333.

(d) It is also submitted that under Act 333 "Federal Road" means a road declared to be a Federal road under Federal law. Since the two highways have been declared by order of the Minister to be Federal roads, it is the Minister of Works and not the local authority which is the proper authority from whom permission is required before works to erect the AES can be carried out.

(e) Further, both submit that the AES poles do not come within the definition of building and therefore the respondent has acted in access of jurisdiction when it issued the said notices to the applicant.

(iv) Respondent's Submission

(a) Mr. Gobind for the respondent submits that the AES posts and camera were erected on State land and as such falls under the jurisdiction of the respondent. In this regard:

(i) Section 40 of the National Land Code ("NLC") provides:

> There is and shall be vested solely in the State Authority the entire property in:
>
> (a) All State land within the territories of the State
> …

(ii) "State land" is defined in Section 5 of the NLC as:

> all land in the State (including so much of the bed of any river, and of the foreshore and bed of the sea, as it within the territories of the State or the limits of territorial waters) other than:
>
> (a) alienated land;
>
> (b) reserved land;
>
> (c) mining land;

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(d) any land which, under the provisions of any law relating to forests (whether passed before or after the commencement of this Act) is for the time being reserved forest, ...

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(iii) Section 41 NLC states that the State Authority shall have the authority to exercise all powers of disposal as provided under Section 42 NLC over property vested in it under Section 40.

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(b) It is further argued that for the purposes of reservation of land, s. 62 of the NLC provides that the State Authority may, by notification in the gazette, reserve any State Land for a public purpose. By virtue of s. 21(1) of the Highway Authority Malaysia (Incorporation) Act 1980, LLM or MHA will only have jurisdiction over highway lands which

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have been gazetted by the Federal Government to be used as highway. It is the respondent's contention that the land on which the AES Posts and Cameras are erected ("said land") is State land as it has never been gazetted for the purposes of the PLUS Highway and the SKVE Highway.

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Hence, the said land falls under the jurisdiction of the respondent and not the MHA. In this regard, the respondent relies on *Ganad Media Sdn Bhd v. Metrawiac Corporation Sdn Bhd & Anor; Pentadbir Tanah Daerah Petaling (Third Party)* [2010] 1 LNS 1254. In that case it

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was decided that until the gazetting under s. 62 of the NLC is done, the land in question remains as State land.

(c) The respondent further submits that the AES poles and cameras do fall under the definition of "building" as defined

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under Act 133 by virtue of the word "post" appearing in the definition. Mr. Gobind on behalf of the respondent had argued that the word "foregoing" in the definition must necessarily relates not only to the first two lines of the definition, but all the four lines. For example, he argued,

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for many years local authorities had many times, issue notices to demolish walls erected on vacant land, with no house, when the walls were erected without permission.

(d) On the non-gazetting of the land for Federal purposes, Mr. Malik Imtiaz for the respondent has sought disclosure

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of the concession agreements from the PLUS Highway and the SKVE Highway to see whether or not there is a

condition precedent in requirement of permit of license. The respondent argues that the non-disclosure of the said concession agreements would entitle the court to have the application for judicial review dismissed.

(v) Findings of the court

(a) It is interesting to note how parties have argued on whether the said AES pole and its camera is a building or not. The applicant persuades the court to look at the decision of the Supreme Court of British Columbia in *ICRV Holdings Ltd v. Tri-Par Holdings Ltd* [1996] 3 RPR (3d) 49 which according to the submissions of the learned counsel for the applicant applied law from the earlier case of *McKenzie v. Ferguson* [1923] 4 DLR 931 which clearly followed the definition of building from the Century Dictionary which says that pole fixed in the earth is not a building but a fence or a wall is.

(b) I have read the judgment in *ICRV*'s case (*supra*). That case involves the interpretation of the word "building" found in s. 32 of their Property Law Act. No definition of building was found in the Act. With due respect, *McKenzie*'s case was only one of the cases considered by the said Supreme Court to determine what is meant by the word "building" but the said Supreme Court did not follow *McKenzie*'s decision.

(c) Our case is different. We do have the definition of "building" in Act 133. Unlike the said Century Dictionary, the word "post"; "wall"; and "fence" are there in its definition of "building". The only issue in interpreting that definition is whether the word "posts", which would without doubt includes poles, appearing in the definition, is to be read as "post connected to the house, hut, shed or roofed enclosure, before it can be said to be a "building".

(d) Mr. Amarjeet, the learned Senior Federal Counsel for the intervener has argued that the phrases 'and also' and 'connected to the foregoing' are used to avoid any doubt that a structure such as a 'wall, fence, platform, staging, gate, post, pillar, paling, frame, hoarding, slip, dock, wharf, pier, jetty, landing-stage or bridge, or any structure support

A or foundation' if connected to a 'house, hut, shed or roofed enclosure' would fall within the definition of 'building'.

This is because, he argues, the word 'foregoing' in the
B phrase 'connected to the foregoing' refers to 'house, hut, shed or roofed enclosure'. He urges the court to note that the word "house" is defined to include "dwelling-house, warehouse, office, counting-house, shop, school, and any other building in which persons are employed" and the
C word 'dwelling house' is also defined to include "a building or tenement wholly or principally used, constructed or adapted for use for human habitation".

All these items, he says, fall within the ordinary meaning
D of a building. However for avoidance of any doubt the word 'building' is given a definition of art by including in its sweep the items - wall, fence, platform, staging, gate, post, pillar, paling, frame, hoarding, slip, dock, wharf, pier, jetty, landing-stage or bridge or any structure support or
E foundation' on the condition that these items are connected to either a house hut, shed or roofed enclosure.

(e) I have considered the arguments put forward by the parties in respect of the definition of building. Act 133 was enacted in 1974 to *inter alia* consolidate the laws relating
F to street drainage and building in local authority areas in Peninsular Malaysia. It came into effect in all local authority areas in Selangor on 1 June 1978 *vide* P.U.(B)279/1978. Later in 1976 the Local Government Act 1976 ('Act 171') was enacted to consolidate the laws relating to local
G government. As far as Sepang District Council's ie, the respondent's area is concerned, it came into effect on 1 September 1994 *vide* P.U.(B) 384/1994, both these Act 133 and 171 concern the powers of local government. In the later Act 171, there is also definition of "building"
H in s. 2, which is as follows:

> "building" includes any house, hut, shed or roofed enclosure, whether use for the purpose of human habitation or otherwise, and also any wall, fence, plat form, underground tank, staging, gate, post, pillar,
I paling, frame, hoarding, ship, dock, wharf, pier, jetty,

lading-stage, swimming pool, bridge, railway lines, transmission lines, cables, reinfusion lines, overhead or underground pipelines, or any other structure, support or foundation.

(f) In Act 171, the later Act, the phrase "connected to the foregoing" is missing in the definition of "building". I believe it was done in purpose because of the confusion that those words would cause in interpreting the words "building". It is clear, without doubt, the word "post", is defined as a building in Act 171. Looking at this later definition in the Act which also concerns local government, I am of the opinion that those words "any wall, fence, platform, post," etc appearing in Act 133 must also be read independently of the words "house, hut, shed, or roofed enclosure" and the phrase "or any structure support or foundation connected to the foregoing" must not confine to the first two lines of the definition. If in Act 171 a "post" is a building, it has to be the same in Act 133. Local government cannot have two different definition of the same word in carrying out its daily function. Hence, I agree if we apply s. 3 of the Act 133, the AES pole with the attached camera is a building under the said section.

(g) But whether Act 133 is applicable in this case, at this stage, is yet to be determined. The court needs to examine who is the proper authority from which permission is required before the AES structure can be erected on the said highways.

(h) Article 74 cl. (1) of the Federal Constitution empowers Parliament to make laws with respect to any matter enumerated in the Federal List in the 9th sch. to the Federal Constitution. If we look at the Federal List, one of the matters is communication and transport which includes roads, if declared to be federal by or under federal law; regulation of traffic by land within one state, carriage of passengers or goods by land and mechanically propel led vehicles. Hence Act 333 was enacted.

(i) Section 85 of the Act 333 provides that no person should carry out any works of any description in, upon, over or under any road unless plans have been submitted and approved, in relation to a Federal road, by the Minister

charged the responsibility for works. Section 67 of the Act 333 provides that "Federal road or *inter alia* means a road declared to be Federal under Federal Law".

(j) Section 3 of the Federal Roads Act 1959 (Act 376) provides *inter alia* that the Minister may after consultation with the government of the state concerned, by order declare any road in any state to be federal.

(k) Both the applicant and the intervener had already shown to the court that the said PLUS Highway and the said SKVE Highway had already been declared as Federal Road pursuant to s. 3 of the Act 376.

(l) However, it has been argued by the respondent that the highways are still on state land and therefore the respondent has jurisdiction over the said highways. At this point, I must emphasise that it has never been disputed by the applicant or the intervener that the land is a state land. So, unlike the case of *Ganard Media Sdn Bhd* (*supra*), the issue here is not whether the land concerned is a state land or federal land.

(m) The point is under art. 80 cl. (1) of the Federal Constitution, the executive authority of the Federation extends to all matters with respect to which Parliament may make laws. In the instance, the executive authority of the Federation extends to all matter with respect to the federal roads. Further, art. 81 of the Federal Constitution also has imposed limitations as to the manner the executive authority of the state is to be exercised by providing that the executive authority of every state shall be so exercised:

(a) as to ensure compliance with any federal law applying to that state; and

(b) as not to impede or prejudice the exercise of the executive authority of the federation.

(n) It is clear that executive authority pertaining to Act 333 and Act 376 are with the Federation. Hence, even though the land is still state land, but since the highways have already been declared as Federal roads under these Acts,

the State Government is under a constitutional obligation to ensure compliance and not to impede or prejudice the exercise of the executive authority of the federation pursuant to these Acts.

(o) I also must stress that the fact that the land is a state land, does not also make the respondent the owner of the land. The local government is a different entity separate from the state government.

(p) Again, I must reiterate, pursuant to s. 85 of the Act 333, the approval to carry out any works of any description in, upon, over or under any Federal road vest with the Minister of Works. The respondent clearly has no authority to give any approval as far as Federal road is concerned.

(q) On the non-disclosure of the concession agreements as argued by the learned counsel for the respondent, I am of the opinion that it is not a relevant issue here. Because the issue before the court is issue of law as to whether the respondent is the proper authority from which permission is required before the AES structure can be erected on the said highway. So whether there is a condition precedent in the concession agreement for the applicant to obtain permission is not relevant.

Conclusion

[14] We must not lose sight that this is an application for judicial review. Lord Greene MR in *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] 1 KB 223 at pp. 233-234 had said as follows:

> The power of the court to interfere in each case is not as appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them.

[15] In *Council of Civil Service Unions & Others v. Minister for the Civil Service* [1984] 3 All ER 935, House of Lords stated that:

> Administrative action is subject to control by judicial review under three heads; (1) illegality; where the decision-making authority has been guilty of an error of law eg,. By purporting to exercise a power it does not have; (2) irrationality, where the decision-making authority has acted so unreasonably that no reason able authority would have made the decision; (3) procedural impropriety, where the decision-making authority has failed in its duty to act fairly.

[16] When illegality is shown, the court can look into the substance or merit of the decision and not merely the process. Refer to *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147. See also *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725; [1998] 1 MLJ 224.

[17] Based on the above, I am of the opinion that the spots where those AES structures are located are within federal roads and does not fall within the jurisdiction of the respondent. If at all any permission need to be obtained, it has to be from the Minister of Works as provided for by s. 85 of the Act 333. By issuing those notices, the respondent is clearly guilty of an error of law and has acted in excess of its jurisdiction and powers. Therefore this court has the power to interfere in its decision. Hence, the application is allowed. As this is a matter of public interest, I make no order as to costs.